AFFIDAVIT IN SUPPORT OF MOTION TO AMEND ORDER

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

OCTOBER TERM, 1950

[SAME TITLE]

STATE OF CONNECTICUT }
COUNTY OF FAIRFIELD } ss.: Stamford

WILLIAM H. TIMBERS, sworn, says:

1. I am one of the attorneys for the petitioners in the above entitled cause and I am familiar with all proceedings heretofore had herein.

2. This affidavit is in support of a motion by the petitioners, in the event their petition for rehearing should be denied and only in that event, to amend the order of this Court, which was entered October 6, 1950, denying petition for mandamus, so as to authorize the Clerk of this Court, upon application by counsel for the petitioners, to certify and transfer to the Court of Appeals for the Ninth Circuit three copies of the record, petition for mandamus and briefs used in this Court, together with the opinion of this Court in the *Magnetic Engineering* case.

3. The purpose of this motion is to facilitate bringing this matter before the Court of Appeals for the Ninth Circuit and to save the cost of reprinting in that Court the papers used in this Court.

4. The cost to the petitioners of printing the record, petitions and briefs in this Court to date has exceeded the

sum of $900 and the net result of such expenditure has been an order of this Court, upon the authority of the *Magnetic Engineering* case, virtually directing the petitioners to apply to the Court of Appeals for the Ninth Circuit for a review upon mandamus of the interlocutory order of transfer by the District Court for the Southern District of New York. While the procedure of making such application to the Court of Appeals for the Ninth Circuit is cumbersome at best, we respectfully request this Court to amend its order of October 6, 1950, in the manner requested so that the petitioners may be spared the additional expense and inconvenience of going first from this Court to the District Court for the Southern District of New York, then to the District Court for the Northern District of California, Southern Division, and there moving to transfer the case back to the Southern District of New York for the purpose of obtaining an order which then may be reviewed upon mandamus by the Court of Appeals for the Ninth Circuit.

5. The instant motion is referred to in the footnote on page 5 of the Petition for Rehearing filed in this Court on October 20, 1950.

WHEREFORE, your deponent respectfully prays that the order of this Court entered October 6, 1950, be amended in the manner requested by the motion in support of which this affidavit is submitted.

WM. H. TIMBERS
WILLIAM H. TIMBERS

Sworn to before me this 21st day of October, 1950.
ROBERT C. BELL, JR.
Notary Public
[SEAL]

Order on Motion to Amend Order

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 26th day of October, one thousand nine hundred and fifty.

Present:

HON. LEARNED HAND,
Chief Judge,
HON. THOMAS W. SWAN,
HON. CHARLES E. CLARK,
Circuit Judges.

CHARLES A. KOONS, *et al.*,
Petitioners,

v.

HON. IRVING R. KAUFMAN,
U. S. D. J.,
Respondent.

A motion having been made herein by counsel for petitioners to amend the decision on the petition for a writ of mandamus,

Upon consideration thereof, it is

Ordered that said motion be and it hereby is denied.

ALEXANDER M. BELL,
Clerk.

Clerk's Certificate

UNITED STATES OF AMERICA

SOUTHERN DISTRICT OF NEW YORK

I, ALEXANDER M. BELL, Clerk of the United States Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 22, inclusive, contain true and complete copies of originals thereof on file in said Court, in the case of

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CHARLES A. KOONS, WALTER E. JONES, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, etc.,
Petitioners,

against

HON. IRVING R. KAUFMAN, *United States District Judge,*
Respondent.

---

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 24th day of November in the year of our Lord one thousand nine hundred and fifty, and of the Independence of the said United States the one hundred and seventy-fifth.

[SEAL]

ALEXANDER M. BELL,
Clerk.

Supreme Court
FILED
DEC 11 19
CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

No. 451 - 452

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION,

Respondents.

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HONORABLE IRVING R. KAUFMAN, United States District Judge,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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December 11, 1950

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION,

Respondents.

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,

Petitioners,

against

HONORABLE IRVING R. KAUFMAN, United States District Judge,

Respondent.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and

FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company, respectfully pray for the issuance of writs of certiorari to the United States Court of Appeals for the Second Circuit to review decisions of that court, entered October 6, 1950, which (1) dismissed petitioners' appeal upon the authority of *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company,* 178 F. (2d) 866 (C. A. 2, 1950) (R. 136-137),* and (2) denied petitioners' petition for a writ of mandamus upon the authority of the same case (M. R. 14-15).*

SUMMARY STATEMENT OF MATTER INVOLVED

Parties to the Action

The complaint names as plaintiffs, CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company, and as defendants, HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION (R. 3).

The partnership, Charles A. Koons & Company, maintains its principal place of business at 620 Fifth Avenue, New York, N. Y. (R. 7).

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*All references in this Petition and in the accompanying Brief to the record are to the printed page numbers (cited "R") of the printed "Transcript of Record" as certified by the Clerk of the Court of Appeals for the Second Circuit, unless otherwise indicated. The Clerk of the Court of Appeals also has certified as a separate document the papers used by the petitioners in the Court of Appeals in connection with their petition for a writ of mandamus in that court; the "Transcript of Record on Petition for Writ of Mandamus" will be cited in this Petition and in the accompanying Brief as "M. R."

The individual partners who are members of the said partnership reside as follows (R.7):

Charles A. Koons	—	Noroton, Connecticut.
Walter E. Koons	—	New York, N. Y.
Vincent Muti	—	Yardley, Pennsylvania.
Jacques Vinmont, Jr.	—	New York, N. Y.
Francis X. Stephens	—	New Rochelle, N. Y.

The defendant, Henry J. Kaiser, resides in Oakland, California. The defendant, Kaiser Colorado Company (hereinafter referred to as "Colorado"), is a California corporation, doing business within the Southern District of New York. The defendant, Kaiser Steel Corporation (hereinafter referred to as "Steel"), is a Nevada corporation, doing business within the Southern District of New York (R. 8).

Nature of the Action

This action was brought to recover the sum of $2,000,000 damages sustained by the plaintiffs as the result of the deceitful action of the defendants who in bad faith violated an agreement of joint venture between the plaintiffs and the defendants, which agreement involved a plan to procure capital for the expansion of Steel, and to procure a market for the products resulting from its expansion, including sales to a company engaged in the distribution of natural gas through the medium of pipe lines to be constructed with the permission of the Federal Power Commission, which company also would furnish additional capital for Steel (R. 7-27). The agreement of joint venture which constitutes the basis of the complaint was negotiated, consummated and performed in New York City (R. 71-72, 77-78, 82-83, 85-93) and most of the witnesses necessary

to the trial of the case reside in New York (R. 98). The action is a partnership suit, based on partnership transactions; the five members of the firm do not sue individually but only as "partners doing business under the firm name of Charles A. Koons & Company". (See discussion at pp. 48-50, *infra,* of the accompanying Brief.)

Proceedings in District Court

Personal service of the summons and complaint was made upon the three defendants in New York City on April 11, 1950, by service upon the defendant, Henry J. Kaiser, individually, who also is President of the two corporate defendants (R. 4-6, 37).

By notice of motion dated May 1, 1950, the defendants moved to dismiss on the ground that the corporate defendants were not doing business in New York, or (if the corporate defendants should be found to be doing business in New York) to dismiss the action or transfer it to the District Court for the Northern District of California, Southern Division, on the ground that venue had been improperly laid in the Southern District of New York, or (if the corporate defendants were found to be doing business in New York and if venue were found to have been properly laid in the Southern District of New York) to transfer the action to the District Court for the Northern District of California, Southern Division, for the convenience of parties and witnesses and in the interest of justice, and (if the action should be dismissed as against either Colorado or Steel or both) to dismiss the balance of the action for lack of indispensable parties (R. 28-30). By an order to show cause dated May 9, 1950, the plaintiffs brought on motions simultaneously with those of the de-

fendants for leave to take depositions upon the jurisdictional issues raised by the defendants' motions and for an adjournment of the defendants' motions until the conclusion of the depositions (R. 67-69).

All of the said motions were brought on and heard by the District Court (Irving R. Kaufman, *D. J.*) on June 2, 1950, and on June 23, 1950, the opinion of the District Court (Irving R. Kaufman, *D. J.*) was filed denying the plaintiffs' motions and granting that branch of the defendants' motions which requested, pursuant to Title 28 of the United States Code, Section 1406 (a), transfer of the action to the District Court for the Northern District of California, Southern Division, on the ground that venue had been improperly laid in the Southern District of New York since neither all of the plaintiffs nor all of the defendants reside within the Southern District of New York as required by Title 28 of the United States Code, Section 1391 (a) (R. 104-117).

Thereafter an order was entered on June 29, 1950, as amended June 30, 1950, by the District Court (Irving R. Kaufman, *D. J.*) directing that the action be transferred to the District Court for the Northern District of California, Southern Division, during the week of October 16, 1950 "unless there shall be a further order of this Court or of the Court of Appeals for the Second Circuit or the United States Supreme Court staying such direction and transfer or making other disposition of this matter" (R.118-120).

Proceedings in Court of Appeals

The plaintiffs sought a review by the Court of Appeals for the Second Circuit of the order of the District Court by means of (1) an appeal (R. 121), on the ground that the

order represents a "final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it"* or, in the alternative, (2) by a petition for a writ of mandamus (M. R. 1-11), on the ground that the order constitutes an erroneous application of the federal venue statute to members of partnerships as parties to such an extent as to amount to a usurpation of power in transferring this action to the Northern District of California, Southern Division.

After argument, the Court of Appeals (L. Hand, Swan and Clark, *C.JJ.*) on October 6, 1950 dismissed the appeal upon the authority of *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company,* 178 F. (2d) 866 (C. A. 2, 1950) (R. 136-137), and denied the petition for a writ of mandamus upon the authority of the same case (M. R. 14-15).**

Thereafter the plaintiffs filed in the Court of Appeals a petition for rehearing (R. 139-152) and a motion (M. R. 16-19), in the event the petition for rehearing should be denied, that the order of the Court of Appeals entered October 6, 1950, denying the petition for mandamus upon the authority of the *Magnetic Engineering* case, should be amended so as to direct the Clerk of the Court of Appeals for the Second Circuit, upon application by counsel for the plaintiffs, to certify and transfer to the Court of Appeals for the Ninth Circuit the record, petition for mandamus

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**Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, 546-547 (1949); *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U. S. 684 (1950).

**The order of the Court of Appeals denying the petition for a writ of mandamus was by vote of only two of the three judges (L. Hand and Swan, *C.JJ.*); Judge Clark did not vote (M. R. 14).

and briefs in the Court of Appeals for the Second Circuit, in order to facilitate bringing this matter before the Court of Appeals for the Ninth Circuit and to save the cost of reprinting in the Ninth Circuit the record, petition and briefs used in the Second Circuit.

On October 26, 1950 the Court of Appeals for the Second Circuit denied the petition for rehearing and the motion to transfer the record, petition and briefs to the Court of Appeals for the Ninth Circuit (R. 153-154; M. R. 20).

BASIS OF THIS COURT'S JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 (a) (formerly Section 240 (a) of the Judicial Code), as enacted by Public Law 773, 80th Cong., 2d Sess.

The decisions of the Court of Appeals, of which the petitioners herein seek review, were entered October 6, 1950 (R. 136-137; M. R. 14-15). The within petition for certiorari was filed December 11, 1950.

The issuance of the mandate of the Court of Appeals for the Second Circuit to the District Court for the Southern District of New York was stayed until November 10, 1950 by order of the Court of Appeals (Chase, *C.J.*) on October 11, 1950, and was further stayed until December 11, 1950 by order of Associate Justice Jackson on November 6, 1950, with the provision that if petitioners shall file their petition for certiorari on or before December 11, 1950 the stay of the mandate shall continue until the petition for certiorari is disposed of.

QUESTIONS PRESENTED

1. Does an order of a district court transferring, rather than dismissing, an action under 28 U. S. C. § 1406(a) because of improper venue constitute "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it"* so as to render that order appealable?

> [*The District Court below of course did not pass upon this question; the Court of Appeals answered the question in the negative and dismissed the appeal upon the authority of Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company, 178 F. (2d) 866 (C. A. 2, 1950) (R. 136-137).*]

2. Should an erroneous order of transfer, where the error would be incorrectible on appeal from final judgment, be reviewed upon mandamus by the court of appeals having appellate jurisdiction over the district court to which the case has been transferred (the court of appeals of the circuit *ad quem*) rather than by the court of appeals having appellate jurisdiction over the district court ordering the transfer (the court of appeals of the circuit *a quo*)?

> [*The District Court below of course did not pass upon this question; the Court of Appeals, in denying the petition for a writ of mandamus upon the authority of the Magnetic Engineering case (M. R. 14-15), necessarily held that the order of transfer should be reviewed upon mandamus by the court of appeals having appellate jurisdiction over the dis-*

**Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, 546-547 (1949); *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U. S. 684 (1950).

trict court to which the case has been transferred (the court of appeals of the circuit ad quem).]

3. In an action brought by a partnership based upon diversity of citizenship where the individual members of the partnership are named as plaintiffs to show proper diversity of citizenship, should the places of residence of the individual partners rather than the principal place of business of the partnership be looked to in determining whether there has been compliance with the venue requirements of Title 28 of the United States Code, § 1391(a), requiring that in a civil action based upon diversity of citizenship all plaintiffs or all defendants must reside in the district where suit is brought?

[*The Court of Appeals below sanctioned the District Court's construction of Title 28 of the United States Code, § 1391 (a), as meaning that the places of residence of the individual members of a partnership are controlling for venue purposes, rather than the principal place of business of the partnership (R. 109-113).*]

REASONS FOR ALLOWANCE OF THE WRITS

(A) The Decision by the Court of Appeals Below, in Dismissing Petitioners' Appeal and Construing 28 U. S. C. § 1291 so as to Deny Review of Venue Claims which Are Fairly Severable from the Context of the Larger Litigious Process, Is Believed to Be in Conflict with Applicable Decisions by this Court.

The decision by the Court of Appeals below in holding, upon the authority of the *Magnetic Engineering* case, that the transfer order of the District Court is not appealable, appears to be in conflict with the following recent decisions by this Court:

1. *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, 546-547 (1949), where, as in the instant case, the order of the district court constituted "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." Moreover, the order of the District Court in the instant case, as in the *Cohen* case (p. 546) "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably." The order appealed from in the instant case certainly is a final disposition of the plaintiffs' claimed right to have venue laid in New York and of the defendants' claimed right to have it laid in California; such claimed rights with respect to the place of trial are not in any sense ingredients of the cause of action, nor did they require consideration with the main cause of action.

It should be noted that the order of the District Court below in the instant case is not an order involving an exercise of discretion based on considerations of forum non conveniens as in the case of transfer orders under Section 1404 (a). The order here proceeds upon the theory that venue had been laid in the "wrong district" because neither all plaintiffs nor all defendants reside there, as required by Section 1391(a). The only element of discretion involved in the District Court's order was whether the action should be dismissed because of improper venue or trans-

ferred to a district in which it could have been brought—alternatives granted by Section 1406(a). Obviously if the District Court had dismissed this action because of improper venue, as it had the power to do under Section 1406(a), such order of dismissal would have been appealable. *Koster* v. *(American) Lumbermen's Mutual Casualty Company,* 153 F. (2d) 888 (C. C. A. 2, 1946), *aff'd,* 330 U. S. 518 (1947); *Gulf Oil Corporation* v. *Gilbert,* 153 F. (2d) 883 (C. C. A. 2, 1946), *rev'd on other grounds,* 330 U. S. 501 (1947). To deny review of the instant order because the District Court chose to transfer rather than to dismiss would give rise to a distinction without a difference between the quality of the venue rights disposed of in each case and would place a premium upon a plaintiff's obtaining a dismissal rather than a transfer when his selection of forum is challenged.*

2. *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U. S. 684 (1950), where this Court reaffirmed the rule of the *Cohen* case and held that an order vacating an attachment, although not a final order, was nevertheless reviewable (pp. 688-698):

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*Concerning the intent of Congress with respect to the appealability of a transfer order under Section 1404 (a), Judge Frank stated in his dissenting opinion in *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company,* 178 F. (2d) 866, 870 (C. A. 2, 1950):

> "However, Congress when it recently substituted a transfer order for an order of dismissal previously used (under the forum non conveniens doctrine) in cases like this, almost surely did not plan such a result, *i.e.,* I think that Congress did not have in mind that the transfer order would be interlocutory and non-appealable. I think, therefore, that a sense of justice should prompt us to grant relief, if possible, by way of mandamus."

> "We believe that the order comes squarely within the considerations of our recent decision in Cohen v. Beneficial Industrial Loan Corp., 337 U. S. 541. The litigation arising out of the claim of the libellants has not run its entire course, but the order now here, like that in the Cohen case, 'appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' 337 U. S. at 546. Appellate review of the order dissolving the attachment at a later date would be an empty rite after the vessel had been released and the restoration of the attachment only theoretically possible. Cf. The Panaghia Kathariotisa, 165 F. 2d 430. Under these circumstances the provision for appeals only from final decisions in 28 U. S. C. § 1291 should not be construed so as to deny effective review of a claim fairly severable from the context of a larger litigious process."

In the instant case, as in the *Swift & Co. case,* appellate review of the transfer order at a later date would be an empty rite and accordingly 28 U. S. C. § 1291 should not here be construed so as to deny effective review of venue claims which fairly are severable from the context of the larger litigious process.

This reason for allowance of the writs is developed in more detail under Point I of the accompanying Brief, pp. 33-36, *infra.*

(B) The Decision by the Court of Appeals Below, in Denying Petitioners' Petition for a Writ of Mandamus and Construing 28 U. S. C. § 1651 (a) so as to Limit the Power of a Court of Appeals to Issue Writs of Mandamus in Aid of Its Appellate Jurisdiction (Meaning in Aid of Federal Court Jurisdiction as Distinguished from State Court Jurisdiction, Rather than in Aid of the Jurisdiction of a Particular Federal Circuit Court), is Believed to Have Decided an Important Question of Federal Law Which Has Not Been, but Should Be, Settled by this Court.

The rule of the case of *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company,* 178 F. (2d) 866 (C. A. 2, 1950), to which the Court of Appeals below adhered in denying the petition for mandamus in the instant case (M. R. 14-15), is that if an interlocutory order of transfer is to be reviewed upon mandamus it should be reviewed by the court of appeals having appellate jurisdiction over the district court to which the case has been transferred (the court of appeals of the circuit *ad quem*) rather than by the court of appeals having appellate jurisdiction over the district court ordering the transfer (the court of appeals of the circuit *a quo*). The Court of Appeals below recognized in the *Magnetic Engineering* case, as it did in the instant case, the need of review of the transfer order before final judgment, since the error in the interlocutory order would be incorrectible on appeal from the final judgment.

There are a number of considerations involved in this rule of the *Magnetic Engineering* case, particularly in its application to the instant case, to which we should like to direct the attention of this Court in support of the instant petition for certiorari:

1. The instant case, unlike the *Magnetic Engineering* case, *has not been transferred* to the Northern District of California. The order of the District Court entered on June 29, 1950 in the instant case directed the Clerk to transfer the case to the Northern District of California during the week of October 16, 1950, "unless there shall be a further order of this Court or of the Court of Appeals for the Second Circuit or the United States Supreme Court staying such direction and transfer or making other disposition of this matter" (R. 120). A further order was entered by the Court of Appeals below (Chase, *C.J.*) on October 11, 1950, staying issuance of the mandate for a period of 30 days, or until November 10, 1950, and directing the Clerk of the District Court not to transfer this case to the Northern District of California until the mandate is issued. A further order was entered by Associate Justice Jackson on November 6, 1950 staying issuance of the mandate until December 11, 1950, with the provision that if petitioners shall file their petition for certiorari on or before December 11, 1950 the stay of the mandate shall continue until the petition for certiorari is disposed of.

2. The order which we sought to have reviewed upon mandamus by the Court of Appeals below in the instant case, unlike the order in the *Magnetic Engineering* case, involved no exercise of discretion on the part of the District Court other than the discretion to transfer rather than to dismiss the case under 28 U. S. C. § 1406(a).

3. The mechanics of obtaining a review upon mandamus by the Court of Appeals for the Ninth Circuit in the instant case, as the petitioners were virtually directed to do by the order of the Court of Appeals below, involve the most extraordinary difficulties and anomalies. In the first place, how is this case to be brought before the Court of Appeals for the Ninth Circuit? We know of no way in which a petition for mandamus, record and brief can be filed with the Court of Appeals for the Ninth Circuit* until there has been entered some order by the District Court for the Northern District of California which can be brought to the Court of Appeals for the Ninth Circuit for review. Presumably, therefore, it will be necessary, after this case has been transferred to the Northern District of California, for the plaintiffs to move in that court to have the case transferred back to the Southern District of New York. If such a motion should be granted, as conceivably it might, that alone would present an anomalous situation. Assuming, however, that the plaintiffs' motion to transfer the case back to the Southern District of New York should be denied and that the

*We filed simultaneously with our petition for rehearing a motion in the Court of Appeals below requesting, in the event the petition for rehearing should be denied, that the order of that court entered October 6, 1950, denying the petition for mandamus upon the authority of the *Magnetic Engineering* case, should be amended so as to direct the Clerk of that court, upon application by counsel for the petitioners, to certify and transfer to the Court of Appeals for the Ninth Circuit the record, petition for mandamus and briefs in the Court of Appeals for the Second Circuit, in order to facilitate bringing this matter before the Court of Appeals for the Ninth Circuit and to save the cost of reprinting in that court the record, petition and briefs used in the Court of Appeals below. This motion was denied (M. R. 20).

Court of Appeals for the Ninth Circuit, upon petition by the plaintiffs, should issue its writ of mandamus directing the case to be transferred back to the Southern District of New York, the question then arises as to whether the District Court for the Southern District of New York would be obliged to carry out the mandate of the Court of Appeals for the Ninth Circuit or whether it would be obliged to act consistently with its earlier order of transfer and again enter an order transferring the case to the Northern District of California. Since the District Court for the Southern District of New York obviously is not subject to the mandate of the Court of Appeals for the Ninth Circuit, presumably it would follow the latter course of procedure. The plaintiffs thereupon would be constrained again to petition the Court of Appeals for the Second Circuit for a writ of mandamus which, under the rule of the *Magnetic Engineering* case, that court would be obliged to deny. And thus the merry-go-round would continue.

4. The direction by the Court of Appeals below to the plaintiffs in the instant case, following the rule of the *Magnetic Engineering* case, to go to the Court of Appeals for the Ninth Circuit in order to obtain a ruling as to whether their selection of the Southern District of New York as the forum for this case was proper, presents an extraordinarily ironic situation. The record shows clearly that the defendants came into the Southern District of New York for the purpose of obtaining the benefits of contractual relations with the plaintiffs; that there the contracts

which gave rise to the agreement which is the subject matter of this action were negotiated, executed and partially performed; and that there virtually all of the witnesses necessary to the trial of this case reside (R. 71-72, 77-78, 82-83, 85-93, 98). And yet when the defendants are called upon to respond in damages as a result of their deceitful action and bad faith in violating their agreement with the plaintiffs, the plaintiffs are directed, at enormous expense and inconvenience to them, to travel 3,000 miles to another forum, not only to try the case, but indeed to obtain another preliminary determination as to the propriety of their selection of forum. Such a result seems hardly consistent with the keystone of the Federal Rules of Civil Procedure that those rules "shall be construed to secure the just, speedy and inexpensive termination of every action" (Rule 1).

5. The rule of the *Magnetic Engineering* case with respect to reviewing orders on mandamus appears to be based on the belief that the power of the Court of Appeals below to issue writs of mandamus in aid of its appellate jurisdiction under 28 U. S. C. § 1651(a) means in aid of *federal court jurisdiction* as distinguished from *state court jurisdiction,* rather than in aid of the *jurisdiction of a particular federal circuit court.* This, we respectfully submit, represents an erroneous construction of 28 U. S. C. § 1651(a) and the views of the Court of Appeals below in this respect have been criticized in Note, *Review of Order Transferring Case from One*

Federal District Court to Another, 50 Col. L. Rev. 537 (1950), at p. 538:

> "However, in the instant case, the court, construing the statutory provision authorizing the issuance of writs in aid of jurisdiction, interpreted those words to mean, not the jurisdiction of a particular federal court, but merely the jurisdiction of federal courts as distinguished from that of state courts. And since the challenged order transferred the cause to another federal court, the majority believed that they were without power to intervene. There appears to be nothing in the language of the statute, its legislative history or the decisions interpreting it which requires the restricted construction here adopted. At the very least, it would seem that the court was free to adopt that interpretation of the statute which would most effectively deal with the problems created by § 1404(a)."

This Note further comments critically upon the holding by the Court of Appeals below that the court of appeals of the circuit *ad quem* is the preferable court to review the interlocutory order of transfer rather than the court of appeals of the circuit *a quo* since the former court would be better able to judge the prerequisite inadequacy of appeal (pp. 538-539):

> "It appears that the court, in denying mandamus, was also influenced by the view that an immediate appellate review through mandamus would be available in the new circuit; and that it would be preferable for that circuit to entertain such a petition, since it would be better able to judge the prerequisite inadequacy of

appeal. However, the court's interpretation of the statutory requirement that mandamus be 'in aid of (its) jurisdiction' would seem to proscribe equally the issuance of this writ by the new circuit. For there seems to be no basis in the statute or precedents for finding greater power to issue mandamus to resist imposition on the eventual appellate jurisdiction of the issuing court than to prevent improper divestment of that jurisdiction. Moreover, the adequacy or inadequacy of appeal after final judgment is inherent in the factual situation presented and does not require the special knowledge of the circuit which would presumptively hear the appeal. But more important, the new circuit, if it determines the order to be erroneous, would have authority only to order its district court to transfer the action back; it would not have jurisdiction to compel the original district court to hear the action. And, should the original court refuse to do so, there would then be no available forum unless the Court of Appeals, after this expensive and awkward shuttle, were to interpose that very relief which it might so much more conveniently provide in the first instance."

6. The decision by the Court of Appeals below in the *Magnetic Engineering* case, in its construction of 28 U. S. C. § 1651(a) as empowering that court to issue writs of mandamus only in aid of federal court jurisdiction as distinguished from state court jurisdiction, rather than in aid of the jurisdiction of a particular federal circuit court, appears to be in conflict with the later decisions of that court in *Ford Motor Company* v. *Ryan,* 182 F. (2d) 329, 330 (C. A. 2, 1950), *cert. den.* 340 U. S. (October 16, 1950) (where the Court of Appeals for the

Second Circuit squarely held that it does have the power to deal with an interlocutory order of transfer by means of a writ of mandamus) and *Foster-Milburn Company* v. *Knight,* 181 F. (2d) 949 (C. A. 2, 1950) (where the Court of Appeals for the Second Circuit held that it would issue a writ of mandamus to correct the erroneous transfer of a case from the Western District of New York to the Southern District of California, Northern Division).

7. Furthermore, the rule of the *Magnetic Engineering* case, in prescribing the method of reviewing interlocutory orders of transfer upon mandamus is in conflict with the decisions of this Court in *Ex parte Collett,* 337 U. S. 55 (1949); *Kilpatrick* v. *Texas & Pacific Railway Company,* 337 U. S. 75 (1949); and *United States* v. *National City Lines, Inc.,* 337 U. S. 78 (1949), where interlocutory transfer orders of district courts were reviewed in advance of appeal from final judgment upon petition for writs of mandamus. In thus reviewing these interlocutory transfer orders under 28 U. S. C. § 1651(a), this Court, without a single dissent as to this procedure, certainly did not read into Section 1651(a) the limitation, sanctioned by the Court of Appeals below in the *Magnetic Engineering* case and in the instant case, upon the word "jurisdiction" as meaning, not the jurisdiction of a particular federal appellate court, but solely federal court jurisdiction as distinguished from state court jurisdiction.

This reason for allowance of the writs is developed in more detail under Point II of the accompanying Brief, pp. 36-47, *infra.*

(C) The Decision by the Courts Below, in Construing 28 U. S. C. § 1391(a) so as to Mean that, in an Action Brought by a Partnership Based Upon Diversity of Citizenship Where the Individual Members of the Partnership Are Named as Plaintiffs to Show Proper Diversity of Citizenship, the Places of Residence of the Individual Partners Rather than the Principal Place of Business of the Partnership Control the Laying of Venue, Is Believed to Have Decided an Important Question of Federal Law which Has Not Been, but Should Be, Settled by this Court.

We respectfully direct the attention of this Court to the following considerations which we believe demonstrate the importance of the erroneous construction placed by the courts below upon the venue provisions of 28 U. S. C. § 1391(a):

1. Application of the venue provisions of § 1391(a) to actions involving partnerships and individual members of partnerships as parties involves questions of wide general importance in the administration of federal justice under the Judicial Code—far exceeding the importance even of the issues of this particular case. The construction placed by the courts below upon § 1391(a) is a novel construction never before placed by any court on that section, so far as we have been able to discover.

2. The importance of the question thus presented stems from the frequency with which the partnership form of business organization is used, particularly in a large mercantile center such as New York. If the precedent created by the decisions of the courts below is permitted to stand, the valuable venue-privilege conferred by Congress upon plaintiffs of

selecting the forum in which to bring suit may be in large measure frustrated. Many partnerships having their principal place of business in New York City are composed of partners who reside in the suburbs of such neighboring states as Connecticut, New Jersey and Pennsylvania. Unless the members of a partnership having its principal place of business in New York City all happen by coincidence to live in the Southern District of New York, that partnership can never sue in the federal court there in a diversity case, under the holding of the courts below, but must search out a forum, if there be one, where all defendants reside, even though, as in the instant case, that forum be 3000 miles away, wholly foreign to the transactions which gave rise to the cause of action and overwhelmingly inconvenient to parties and witnesses. Indeed, in many cases between partnerships or by partnerships against multiple defendants, it would be impossible to sue at all in a federal court because of the inability to find a district in which all members of either partnership or all defendants reside—despite the fact that looking to the partnership's principal place of business as controlling for venue purposes would facilitate immeasurably the bringing of suit in the federal courts by or against partnerships and in many instances would open the federal courts to partnership litigants who otherwise would be denied access.

3. The decisions by the courts below are in conflict with a decision by the District Court for the Eastern District of Pennsylvania in the case of *Darby* v.

Philadelphia Transportation Company, 73 F. Supp. 522 (E. D. Pa. 1947, Ganey, *D. J.*) where, in a carefully reasoned opinion, that court held that the requirements of the federal venue statute had been complied with since venue had been laid where the defendant partnership had its principal place of business even though the individual partners were citizens of different states.

4. The decisions by the courts below are in conflict with the case of *Sperry Products, Inc.* v. *Association of American Railroads,* 132 F. (2d) 408 (C. C. A. 2, 1942), where the court held that an unincorporated association was a jural entity with reference to venue and, accordingly, the requirements of the federal venue statute were satisfied if venue were laid where the principal activities of the unincorporated association took place; the court there permitted suit in the district of the unincorporated association's principal office or place of business. While the District Court below flatly refused to follow the analogy between the instant case involving a partnership and the unincorporated association cases (R. 111), Professor James William Moore, the distinguished Special Consultant to the Revision Staff which revised Title 28 of the United States Code relating to the Judiciary and Judicial Procedure, has stated in 3 Moore's Federal Practice 1416 (2d ed. 1948):

> "While the *Sperry Products* case dealt with an unincorporated association and not a partnership, it should be followed with regard to partnerships as well. As we have seen, the analogy to corporations drawn by the court in the *Suther-*

land case is entirely unworkable as applied to a partnership having members who are citizens of more than one state. A workable alternative is the 'principal place of business' test used in the *Sperry* case, and this has been adopted" (citing the *Darby* case, *supra*).

The District Court below relied heavily upon the *Sutherland* case (R. 110), referred to by Professor Moore, *supra*, as "entirely unworkable as applied to a partnership having members who are citizens of more than one State."

5. The decisions by the courts below are in conflict with the changing legal concept of a partnership from that which obtained at common law to the concept of a partnership as a jural entity for venue purposes. Specifically, in attempting to carry out the mandate of Rule 17(b) of the Federal Rules of Civil Procedure which requires a district court to determine by the law of the state in which the court is held the capacity of a party to sue or be sued, the District Court below erroneously held that under New York law a partnership is not a jural entity separate from its individual partners (R. 113). This holding is squarely in conflict with § 222(a) of the New York Civil Practice Act, with the provisions of the Uniform Partnership Act (which is in force in New York as the New York Partnership Law) and with the decisional law of New York which recognizes a partnership as a separate jural entity.

This reason for allowance of the writs is developed in more detail under Point III of the accompanying Brief, pp. 48-83, *infra*.

PRAYER

For the reasons outlined above, developed more in detail in the accompanying Brief, your petitioners pray that writs of certiorari issue out of this Court to the United States Court of Appeals for the Second Circuit and that the duly certified transcripts of the proceedings below which accompany this Petition shall be treated as though filed in response to the aforesaid writs, to the end that the above entitled causes may be reviewed and determined by this Court; that the decisions of the Court of Appeals below may be reversed; and that your petitioners may be granted such other, further and different relief as this Court may deem proper.

Dated: Stamford, Connecticut, December 11, 1950.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,
Petitioners,

against

HENRY J. KAISER, KAISER COLORADO COMPANY and KAISER STEEL CORPORATION,
Respondents.

CHARLES A. KOONS, WALTER E. KOONS, VINCENT MUTI, JACQUES VINMONT, JR., and FRANCIS X. STEPHENS, partners doing business under the firm name of Charles A. Koons & Company,
Petitioners,

against

HONORABLE IRVING R. KAUFMAN, United States District Judge,
Respondent.

BRIEF IN SUPPORT OF PETITION

OPINIONS BELOW

The opinion of the District Court (R. 104-117) is reported at 91 F. Supp. 511.

The opinions of the Court of Appeals (R. 136; M. R. 14) are not reported officially.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Title 28 of the United States Code, Section 1254 (a) (formerly Section 240 (a) of the Judicial Code), as enacted by Public Law 773, 80th Cong., 2d Sess.

The decisions of the Court of Appeals, of which the petitioners herein seek review, were entered October 6, 1950 (R. 136-137; M. R. 14-15). The within petition for certiorari was filed December 11, 1950.

The issuance of the mandate of the Court of Appeals for the Second Circuit to the District Court for the Southern District of New York was stayed until November 10, 1950 by order of the Court of Appeals (Chase, *C.J.*) on October 11, 1950, and was further stayed until December 11, 1950 by order of Associate Justice Jackson on November 6, 1950, with the provision that if petitioners shall file their petition for certiorari on or before December 11, 1950 the stay of the mandate shall continue until the petition for certiorari is disposed of.

STATEMENT OF THE CASE

A summary statement of the matter involved herein is set forth in the foregoing Petition at pp. 2-7, *supra*. A summary of the argument is set forth in the index.

STATUTES AND RULES INVOLVED

United States Code, Title 28

Section 1291:

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts

of the United States, the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

Section 1391:

"(a) A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in the judicial district where all plaintiffs or all defendants reside."

* * *

"(c) A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes."

Section 1406:

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Section 1651:

"(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

New York Civil Practice Act

Section 222-a:

"*Action or proceeding in partnership name.* Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons. If the persons be defendants in an action or proceeding, the summons or other process may be served upon any one or more of them with like effect as though all of the persons had been named as defendants by their own respective names. Where a judgment is taken against the defendants, the clerk with whom the judgment-roll is filed, must write upon the docket opposite the name of each defendant upon whom the summons was served, the word 'summoned'; and a like entry must be made by each county clerk with whom the judgment is afterwards docketed. An execution upon such judgment may be collected out of the real and personal property of the partnership, and out of the real and personal property of the persons summoned, whose names shall be indorsed on the execution." (Added L. 1945 ch. 842, in effect Sept. 1)

Federal Rules of Civil Procedure

Rule 17 (b):

"*Capacity to Sue or Be Sued.* The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized. In all other cases

capacity to sue or be sued shall be determined by the law of the state in which the district court is held, except (1) that a partnership or other unincorporated association, which has no such capacity by the law of such state, may sue or be sued in its common name for the purpose of enforcing for or against it a substantive right existing under the Constitution or laws of the United States, and (2) that the capacity of a receiver appointed by a court of the United States to sue or be sued in a court of the United States is governed by Title 28, U. S. C., §§ 754 and 959(a)." (As amended Dec. 27, 1946, and Dec. 29, 1948, effective Oct. 20, 1949.)

SPECIFICATIONS OF ERRORS TO BE URGED

The Court of Appeals below erred:

1. In dismissing petitioners' appeal and construing 28 U. S. C. § 1291 so as to deny review of venue claims which are fairly severable from the context of the larger litigious process.

2. In denying petitioners' petition for a writ of mandamus and construing 28 U. S. C. § 1651 (a) so as to limit the power of a court of appeals to issue writs of mandamus in aid of its appellate jurisdiction, meaning in aid of federal court jurisdiction as distinguished from state court jurisdiction, rather than in aid of the jurisdiction of a particular federal circuit court.

The Court of Appeals below erred in sanctioning the errors committed by the District Court:

3. In placing upon 28 U. S. C. § 1391 (a) a novel construction never before placed by any court on that section in its application to members of partnerships as parties.

4. In refusing to follow the decision by the District Court for the Eastern District of Pennsylvania in the case of *Darby* v. *Philadelphia Transportation Company,* 73 F. Supp. 522 (E. D. Pa. 1947, Ganey, *D. J.*), where that court held that the requirements of the federal venue statute had been complied with since venue had been laid where the defendant partnership had its principal place of business even though the individual partners did not all reside in the district where suit was brought.

5. In refusing to follow the analogous reasoning of the case of *Sperry Products, Inc.* v. *Association of American Railroads,* 132 F. (2d) 408 (C. C. A. 2, 1942), where the court held that an unincorporated association was a jural entity with reference to venue and, accordingly, the requirements of the federal venue statute were satisfied if venue were laid where the principal activities of the unincorporated association took place; the court there permitted suit in the district of the unincorporated association's principal office or place of business.

6. In failing correctly to carry out the mandate of Rule 17(b) of the Federal Rules of Civil Procedure which requires a district court to determine by the law of the state in which the court is held the capacity of a party to sue or be sued; the District Court below erroneously held that under the law of New

York a partnership is not a jural entity separate from its individual partners—a holding which is squarely contrary to Section 222(a) of the New York Civil Practice Act, to the provisions of the Uniform Partnership Act (which is in force in New York as the New York Partnership Law) and to the decisional law of New York which recognizes a partnership as a separate jural entity.

7. In infringing upon the valuable venue-privilege conferred by Congress upon plaintiffs, including the petitioners herein, of selecting the forum in which to bring suit, thus usurping power to transfer this action when in fact such power was beyond that conferred upon the District Court.

ARGUMENT

POINT I

THE ORDER OF THE DISTRICT COURT BELOW WAS APPEALABLE.

The order of the District Court below (R. 118-120), which deprives the plaintiffs of their valuable venue-privilege of having this case tried in the forum of their selection, constitutes, we submit, upon the authority of *Cohen* v. *Beneficial Industrial Loan Corporation,* 337 U. S. 541, 546-547 (1949), "a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it."

The order in the *Cohen* case which the Court of Appeals for the Third Circuit reviewed upon appeal before final judgment (170 F. (2d) 44), and which this Court

upon certiorari held was properly reviewable before final judgment, was an order by the District Court for New Jersey denying the defendant's motion in a stockholder's derivative action to require the plaintiff to furnish security. This Court pointed out (p. 545) that the order of the district court obviously would not be appealable "if Congress had allowed appeals only from those final judgments which terminate an action," referring to the provision of Title 28 of the United States Code, Section 1291, that "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * *" Nor were the provisions of Section 1292, allowing appeals from certain interlocutory orders, decrees and judgments, material to the question of the appealability of the order in the *Cohen* case "except as they indicate the purpose to allow appeals from orders other than final judgments when they have a final and irreparable effect on the rights of the parties" (p. 545). No order other than a final judgment could have a more "final and irreparable effect on the rights of the parties" than the order of the District Court below in the instant case.

This Court, continuing its analysis of Section 1291 in the *Cohen* case, stated (p. 546):

> "The effect of the statute is to disallow appeal from any decision which is tentative, informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. But the District Court's action upon this application was concluded and closed and its decision final in that sense before the appeal was taken."

The decision by the District Court below upon the parties' venue claims is not "tentative, informal or incomplete"; nor is the matter "open, unfinished or inconclusive." The appeal to the Court of Appeals below invoked "a power of review, not one of intervention."

The following language of this Court in the *Cohen* case, in stressing the irreparable harm which would be inflicted by postponing review of the order of the district court until review of the decision on the merits of the case, is peculiarly applicable to the order of the District Court in the instant case (p. 546):

> "Nor does the statute permit appeals, even from fully consummated decisions, where they are but steps towards final judgment in which they will merge. The purpose is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results. *But this order of the District Court did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order, and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably. We conclude that the matters embraced in the decision appealed from are not of such an interlocutory nature as to affect, or to be affected by, decision of the merits of this case.* (Italics added.)
>
> This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is ad-

judicated. The Court has long given this provision of the statute this practical rather than a technical construction. *Bank of Columbia* v. *Sweeny,* 1 Pet. 567, 569; *United States* v. *River Rouge Co.,* 269 U. S. 411, 414; *Cobbledick* v. *United States,* 309 U. S. 323, 328."

This Court concluded its discussion of the appealability of the order in the *Cohen* case by pointing out that, as in the instant case, the order disposed of a right which "presents a serious and unsettled question;" that the right was not "admitted or clear;" and the order did not involve "only an exercise of discretion" (p. 547).

The rule of the *Cohen* case has been reaffirmed in *Swift & Co.* v. *Compania Colombiana del Caribe,* 339 U. S. 684 (1950), where an order vacating an attachment, although not a final order, nevertheless was held reviewable.

POINT II

THE ORDER OF THE DISTRICT COURT BELOW SHOULD HAVE BEEN REVIEWED UPON MANDAMUS BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT, NOT BY THE COURT OF APPEALS FOR THE NINTH CIRCUIT.

The order of the District Court below should have been reviewed by writ of mandamus by the Court of Appeals below upon the authority of *Ford Motor Company* v. *Ryan,* 182 F. (2d) 329 (C. A. 2, 1950). To paraphrase the language of the Court of Appeals below in the *Ford Motor* case (p. 330), this is "* * * the kind of interlocutory order with which this court can properly deal by way of such a writ, since, should petitioners—the (plaintiffs)—lose below, any error in the interlocutory order would probably be incor-

rectible on appeal, since petitioners could hardly show that a different result would have been reached had the suit (not) been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's (order of transfer). * * *"

Before holding that the order in the *Ford Motor* case denying transfer "was the kind of interlocutory order with which this court can properly deal by way of such a writ", the Court of Appeals below recognized "that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ" (p. 330). The instant case, however, is an even stronger one than the *Ford Motor* case for review by mandamus. Here, unlike in the *Ford Motor* case, there was raised for review no element of discretion in the action of the District Court. The order of transfer below was so erroneous (as hereinafter shown) as to constitute, not merely an error in the exercise of conceded judicial power, but a usurpation of power by the District Court. No subsequent decision on the merits can redress the injury inflicted upon the petitioners by this order which was beyond the power conferred upon the District Court. As this Court stated, in reviewing by extraordinary writ an interlocutory order of the District Court for the Southern District of New York in *De Beers Mines* v. *United States,* 325 U. S. 212 (1945), at p. 217:

> "* * * no decision of the suit on the merits can redress any injury done by the order; and therefore unless it can be reviewed under § 262 [predecessor of Section 1651(a) of Title 28 of the United States Code] it can never be corrected if beyond the power of the court below. When Congress withholds interlocutory reviews, § 262 can, of course, not be availed of to correct a mere error in the exercise

> of conceded judicial power. But when a court has no judicial power to do what it purports to do—when its action is not mere error but usurpation of power —the situation falls precisely within the allowable use of § 262. We proceed, therefore, to inquire whether the District Court is empowered to enter the order under attack."

The District Court in the instant case exceeded its prescribed jurisdiction in transferring the case from the Southern District of New York to the Northern District of California, Southern Division, on the ground that venue had been improperly laid in the Southern District of New York—its action resulting from an erroneous construction of Section 1391(a) as requiring that the places of residence of the individual members of a partnership are controlling for venue purposes, rather than the principal place of business of the partnership (R. 109-113). The correction of such an overstepping of the bounds of a district court's jurisdiction is precisely the function of such an extraordinary writ as that here sought. This Court stated, in reviewing by extraordinary writ another interlocutory order of the District Court for the Southern District of New York in *United States Alkali Export Association* v. *United States,* 325 U. S. 196 (1945), at p. 202:

> "The traditional use of such writs both at common law and in the federal courts has been, in appropriate cases, to confine inferior courts to the exercise of their prescribed jurisdiction or to compel them to exercise their authority when it is their duty to do so."

Clearly the error of the District Court in entering the transfer order in the instant case cannot be corrected upon

appeal from final judgment on the merits of the case. The incorrectibility of such an error upon appeal from final judgment accentuates the gravity of the error, particularly since such a result would thwart the Congressional policy of granting to plaintiffs such as the petitioners herein the valuable venue-privilege of bringing suit in the forum of their selection. Such considerations should properly have been taken into account by the Court of Appeals below in determining whether to exercise its discretion in reviewing the order of the District Court by extraordinary writ in advance of final judgment, as this Court did in the *Alkali* case, *supra,* at p. 204:

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of the asserted Congressional policy of conferring primary jurisdiction on the Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

We recognize of course that writs of mandamus and other extraordinary writs "are reserved for really extraordinary causes." *Ex parte Fahey,* 332 U. S. 258, 260 (1947); *Bank Line* v. *United States,* 163 F. (2d) 133, 136 (C. C. A. 2, 1947); *Ward Baking Company* v. *Holtzoff,* 164 F. (2d) 34, 36 (C. C. A. 2, 1947). Such writs nevertheless repeatedly have been issued to correct errors by the district courts, including errors relating to procedural matters. In *Ex parte Peru,* 318 U. S. 578 (1943), the Supreme Court directed issuance of a writ of mandamus and/or prohibition to compel the district court to surrender the vessel of a friendly foreign state and to remit

the parties to relief obtainable through diplomatic negotiation. In *Ex parte Kawato,* 317 U. S. 69 (1942), a writ of mandamus was issued to compel a district court to proceed with the trial of a suit in admiralty by a resident alien enemy, the Supreme Court stating (p. 71), "If the court's order of abatement was erroneous, mandamus is the appropriate remedy." In *Ex parte United States,* 287 U. S. 241 (1932), a writ of mandamus was granted to compel a district court to issue a bench warrant upon application of the United States attorney. In *Ex parte Simons,* 247 U. S. 231 (1918), a writ of mandamus was issued to compel the District Court for the Southern District of New York to grant to the plaintiff her right to trial by jury, Mr. Justice Holmes stating for a unanimous Court (p. 239):

> "If we are right, the order was wrong and deprived the plaintiff of her right to a trial by jury. It is an order that should be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by a severance that ultimately must be held to have been required under a mistake."

In *McClellan* v. *Carland,* 217 U. S. 268 (1910), this Court directed the circuit court of appeals to issue a writ of mandamus to compel the lower court to vacate a stay of proceedings which it had granted pending conclusion of certain proceedings in the state courts. The Court of Appeals below in *Bereslavsky* v. *Caffey,* 161 F. (2d) 499 (C. C. A. 2, 1947), issued a writ of mandamus directing the district court to vacate an order striking a jury demand.

Aside from the function of the extraordinary writs to confine inferior courts to the exercise of their prescribed jurisdiction and to compel them to exercise their authority

when it is their duty to do so (*United States Alkali Export Association* v. *United States, supra,* at p. 202; *Roche* v. *Evaporated Milk Association,* 319 U. S. 21, 26 (1943); *Ex parte Peru, supra,* at p. 583), the prime considerations in the issuance or withholding of such writs appear to be the absence or availability of relief on appeal from a final judgment. *Ex parte Fahey, supra,* at p. 260; *Roche* v. *Evaporated Milk Association, supra,* at p. 27; *Ford Motor Company* v. *Ryan, supra,* at p. 330; *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company,* 178 F. (2d) 866, 869-870 (C. A. 2, 1950). While it has been said that the extraordinary writs should be issued only in aid of the court's appellate jurisdiction (*Ex parte Peru, supra,* at p. 582; *Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company, supra,* at pp. 869-870; *Mottolese* v. *Kaufman,* 176 F. (2d) 301, 302 (C. A. 2, 1949)), it has been squarely held that this does not necessarily mean already acquired appellate jurisdiction, but prospective appellate jurisdiction as well. *Roche* v. *Evaporated Milk Association, supra,* at p. 25; *Ex parte Peru, supra,* at pp. 584-585; *Ex parte United States, supra,* at p. 246; *McClellan* v. *Carland, supra,* at pp. 279-280.

Reading together two recent mandamus cases of the Court of Appeals below (*Magnetic Engineering & Manufacturing Company* v. *Dings Manufacturing Company, supra,* and *Ford Motor Company* v. *Ryan, supra*), it would appear that an important consideration in deciding whether to review by mandamus a transfer order of the district court is whether an erroneous transfer of the case will deprive the court of appeals which would have had jurisdiction over the case, had it not been transferred, of ultimate appellate jurisdiction to correct the erroneous transfer. In

the *Magnetic Engineering* case, decided on January 4, 1950, the Court of Appeals below clearly recognized the need of review of the transfer order before appeal from final judgment,* but held that the Court of Appeals for the Seventh Circuit, which had jurisdiction over the district court to which the case had been transferred, should more appropriately review the order of transfer than the Court of Appeals below which had jurisdiction over the district court which ordered the transfer; accordingly, the Court of Appeals below declined to review the transfer order upon mandamus, although holding that it was free to treat the appeal as a petition for mandamus.** Four months later, on May 8, 1950, in the *Ford Motor* case, the Court of Appeals below, consisting of the same three judges as in the *Magnetic Engineering* case, held that an interlocutory order refusing to order a transfer under Section 1404(a) is "the kind of interlocutory order with which this court can properly deal by way of such a writ." While the *Magnetic Engineering* case was not expressly overruled by the *Ford Motor* case, it appeared to have been in effect; surely if an interlocutory order refusing a transfer can be reviewed upon mandamus, it should be supposed that an interlocutory order granting a transfer would be reviewed upon mandamus. Accordingly, it appeared that the *Magnetic Engineering* and *Ford Motor* cases, read together, disclosed a determination by the Court of Appeals below to review by mandamus, in an appropriate case, an erroneous order of a

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" * * since the absence of any relief upon appeal from final judgment is so critical in the decision, surely it is appropriate for that court to decide it, which will decide the appeal itself" (178 F. (2d) 866, 870).

**The *Magnetic Engineering* case was criticized in Note, *Review of Order Transferring Case From One Federal District Court to Another,* 50 Col. L. Rev. 537 (1950).

district court either granting or refusing to grant a transfer, and not to remit the aggrieved party for relief to the court of appeals having jurisdiction over the district court to which the transfer has been made. Such a rule would preserve the jurisdiction of the Court of Appeals over a case which erroneously had been transferred and would prevent such error from becoming submerged by subsequent proceedings in the district and circuit to which the case had been erroneously transferred.

The decision by the Court of Appeals below in the instant case, however, in denying mandamus upon the authority of the *Magnetic Engineering* case (M. R. 14-15), not only is squarely in conflict with the decision by the same court in the *Ford Motor* case, but also represents an erroneous construction of 28 U. S. C. § 1651(a) so as to limit the power of a court of appeals to issue writs of mandamus in aid of its appellate jurisdiction, meaning in aid of federal court jurisdiction as distinguished from state court jurisdiction, rather than in aid of the jurisdiction of a particular federal circuit court. Moreover, the decision by the Court of Appeals below, in denying mandamus upon the authority of the *Magnetic Engineering* case, is in conflict with the decision by the same court in *Foster-Milburn Company* v. *Knight,* 181 F. (2d) 949 (C. A. 2, 1950),* where that court

*At the time of argument of the instant case in the Court of Appeals below, Judge Learned Hand stated from the bench that he had been informed by Judge Goodrich of the Court of Appeals for the Third Circuit that the Third Circuit was about to decide a mandamus case directly contrary to the decision of the Court of Appeals for the Second Circuit in the *Foster-Milburn* case. The case in the Third Circuit to which Judge Goodrich referred is *Tivoli Realty, Inc.* v. *Paramount Pictures, Inc.*, Docket No. 10191 (C. A. 3, 1950), which originally was argued in that court on June 7, 1950 and was reargued on October 3, 1950. The clerk of the Court of Appeals for the Third Circuit has advised us that, although no decision has been rendered

held that it would issue a writ of mandamus to correct the erroneous transfer of a case from the Western District of New York to the Southern District of California, Northern Division.

We respectfully suggest that all of the earlier decisions dealing with writs of mandamus and other extraordinary writs must be viewed in the light of the most recent cases in which this Court, upon applications for mandamus or other extraordinary writs, reviewed interlocutory orders of transfer under Section 1404(a) of Title 28 of the United States Code: *Ex parte Collett,* 337 U. S. 55 (1949); *Kilpatrick* v. *Texas & Pacific Railway Company,* 337 U. S. 75 (1949); *United States* v. *National City Lines, Inc.,* 337 U. S. 78 (1949). In all of these cases, the district courts (including the District Court for the Southern District of New York, in the *Kilpatrick* case) had transferred the cases to other districts under Section 1404(a). In each case the aggrieved party filed in this Court a motion for leave to file a petition for writ of mandamus or other extraordinary writ. All three cases were assigned for hearing on these motions. The cases were fully briefed and argued in this Court upon the correctness of the transfer order in each case. This Court filed an opinion in each case and held, after an exhaustive review of the legislative history of Section 1404(a), that that section was applicable to suits brought under statutes containing special venue provisions. Since the transfer order in each case

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to date in the *Tivoli* case following reargument, a decision is expected shortly. If the information given by Judge Goodrich to Judge Learned Hand is borne out, the decision by the Court of Appeals for the Third Circuit in the *Tivoli* case will be directly in conflict with the decision by the Court of Appeals for the Second Circuit in the *Foster-Milburn* case.

was found to have been properly made and to represent a proper application of Section 1404(a), the motion in each case for leave to file a petition for writ of mandamus or other extraordinary writ was denied, thus in effect affirming the transfer orders of the district courts. The importance of the decisions in these three cases, from the standpoint of the instant case, lies in the fact that this Court, without a single dissent as to this procdure, reviewed in full, upon applications for leave to file petitions for extraordinary writs, the interlocutory transfer orders of the district courts in advance of appeal from final judgment, and decided upon the merits the question of whether Section 1404(a) had been properly applied by the district courts in making the transfer orders. Inasmuch as the jurisdiction of this Court in each case was invoked pursuant to Section 1651(a) of Title 28 of the United States Code, and having in mind this Court's insistence upon the necessity of a showing of absence of relief on appeal from final judgment as a condition precedent to review of interlocutory orders upon mandamus, it follows, we submit, that this Court did recognize in these cases that any error by the district courts in making the transfer orders under Section 1404(a) would be incorrectible on appeal. Significantly, also, this Court in the *Collett, Kilpatrick* and *National City Lines* cases did not read into Section 1651(a) the limitation, sanctioned by the Court of Appeals below in the *Magnetic Engineering* case, upon the word "jurisdiction" as meaning, not the jurisdiction of a particular federal appellate court, but solely federal court jurisdiction as distinguished from state court jurisdiction.

Moreover the decision by the Court of Appeals below in *Ford Motor Company* v. *Ryan, supra,* follows precisely the

procedure sanctioned by this Court in the *Collett, Kilpatrick* and *National City Lines* cases, the only difference being that in the *Ford Motor* case an interlocutory order refusing a transfer was involved, whereas in the latter three cases interlocutory orders granting transfers were involved. In all four cases, interlocutory orders of district courts were reviewed upon applications for mandamus or other extraordinary writs in advance of appeal from final judgment and, although the extraordinary writs in all four cases were denied, they were denied only after a full review of the interlocutory orders upon their merits had convinced the appellate courts of their correctness, the denial of the extraordinary writ in each case being tantamount to affirmance of the interlocutory order. Such procedure likewise was followed by this Court in *Ex Parte Peterson*, 253 U. S. 300 (1920), where an interlocutory order of the District Court for the Southern District of New York appointing an auditor in a law case was fully reviewed on its merits in advance of final judgment; while this Court found that the district court's order appointing an auditor was correct and therefore the petition for mandamus was denied, it nevertheless dismissed the respondent's objection to this Court's jurisdiction to review the case upon mandamus as follows (pp. 305-306):

> "Objection is made by respondent to the jurisdiction of this court. It is insisted that the District Court had jurisdiction of the parties and of the cause of action; that if the auditor should proceed to perform the duties assigned to him and his report should be used at the trial before the jury, the plaintiff could protect his rights by exceptions which would be subject to review by the Circuit Court of Appeals; and that the writs prayed for may not be used merely

> to correct errors. But if proceedings pursuant to the appointment of an auditor would deprive petitioner of his right to a trial by jury, the order should, as was said in *Ex parte Simons,* 247 U. S. 231, 239, 'be dealt with now, before the plaintiff is put to the difficulties and the Courts to the inconvenience that would be raised by' a proceeding 'that ultimately must be held to have been required under a mistake.' The objection to our jurisdiction is unfounded. We proceed, therefore, to the consideration of the merits of the petition."

In conclusion under this Point, we respectfully urge that the Court of Appeals below should have reviewed the order of the District Court upon mandamus and have corrected the error committed by the District Court in construing Section 1391(a) in such a manner as to require transfer of this case from the Southern District of New York to the Northern District of California, Southern Division, such error constituting not merely an error in the exercise of conceded judicial power but a usurpation of power by the District Court. Only by such action by the Court of Appeals can the District Court be confined to the exercise of its prescribed jurisdiction and the injury done to the petitioners by the order of transfer be redressed, since the error will be incorrectible upon appeal from final judgment.

POINT III

THE DISTRICT COURT BELOW ERRED IN HOLDING THAT THE PLACES OF RESIDENCE OF THE INDIVIDUAL PARTNERS RATHER THAN THE PRINCIPAL PLACE OF BUSINESS OF THE PARTNERSHIP CONTROL THE LAYING OF VENUE UNDER SECTION 1391(a) IN A PARTNERSHIP SUIT.

(A) This Is a Partnership Suit in which the Partnership is the Real Plaintiff.

The District Court below rested its decision upon the fact that the individual partners of the firm of Charles A. Koons & Company were named as plaintiffs and not merely the firm itself (R. 109, 111, 113). Despite the fact that the five members of the firm *do not sue individually* but only as *"partners doing business under the firm name of Charles A. Koons & Company"*, the District Court nevertheless held that "The real plaintiff here is not the partnership * * * there are five individuals who are likewise plaintiffs" (R. 111).

Aside from the fact that the complaint itself plainly indicates that this is a partnership suit and *not* a suit by the members of the firm suing individually, the record shows that the transactions which gave rise to this suit were transactions between Kaiser and his companies on the one hand and Charles A. Koons & Company *as a partnership* on the other hand—the individual members of the partnership, as individuals, had nothing whatever to do with these transactions. For example, the contracts of August 18, 1947 which involved $11,000,000 and pipe sales for five years (R. 77) and which gave rise to the agreement of joint venture referred to in the complaint (Exhibits A and B, annexed to

the complaint; R. 15-26) were both entered into by Kaiser Industries (predecessor of defendant Kaiser Colorado Company) with *"Charles A. Koons & Company, a Co-partnership"* (R. 23, 26). Throughout these agreements the partnership is referred to as "Koons" or "it"; the individual members of the partnership are not referred to. Likewise the commitment letter of December 8, 1947, which was given by Koons to Kaiser at the latter's request pursuant to the agreement of joint venture and which involved sales for a period of five years amounting to at least $30,000,000 (Exhibit C, annexed to complaint; R. 27, 77, 90-92), was signed by *"Charles A. Koons & Company";* this represented a *partnership* commitment and the individual members of the firm as such were not involved. Clearly the transactions which gave rise to this suit were partnership transactions and the real party plaintiff is the partnership on whose behalf the suit was brought—not the individual members of the partnership who, as individuals, had nothing to do with the transactions giving rise to this suit and who, as individuals, are not parties thereto.

Actually the individual members of the partnership were named in the complaint and their places of residence were set forth in full (R. 7) in order to show the complete diversity of citizenship between all members of the plaintiff partnership and all defendants. Such pleading, to show the diversity basis for federal jurisdiction when a partnership is a party, has long been recognized as proper and necessary pleading. 4 Cyclopedia of Federal Procedure 468 (2d ed. 1943); 3 Moore's Federal Practice 1412-1413 (2d ed. 1948); *Strawbridge* v. *Curtis,* 3 Cranch [U. S.] 267 (1806); *Great Southern Fireproof Hotel Company* v. *Jones,* 177 U. S. 449 (1900); *Gioco* v. *Russell & Co.,* 4 F.

(2d) 7 (C. C. A. 1, 1925); *H. L. Bruett & Co.* v. *F. C. Austin Drainage Excavator Co.,* 174 Fed. 668 (C. C. N. D. Ia. 1909); *Columbia Digger Co.* v. *Rector,* 215 Fed. 618 (W. D. Wash. 1914); *Western Mutual Fire Insurance Company* v. *Lamson Brothers & Co.,* 42 F. Supp. 1007 (S. D. Ia. 1941).

Since Section 222-a of the New York Civil Practice Act, which, under Rule 17 (b) of the Federal Rules of Civil Procedure, determines the capacity of a New York partnership to sue or be sued, provides that "Two or more persons carrying on business as partners may sue or be sued in their partnership name whether or not such name comprises the names of the persons", it probably was not necessary to name the individual partners as plaintiffs in this action; suit in the partnership name alone would have sufficed. It being necessary, however, to name the individual members of the partnership in the complaint and to set forth their separate residences for jurisdictional purposes, it would seem that the inclusion of their names in the caption was, at most, surplusage which prejudiced no one. Surely it did not transform what is clearly a partnership suit, based on partnership transactions, into a suit by the individuals who comprise the partnership, *since they are not suing as individuals.**

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*In *Silberfeld* v. *Swiss Bank Corporation,* 273 App. Div. 680 (1st Dept. 1948), *aff'd* 298 N. Y. 776 (1948), the Appellate Division, First Department, stated (p. 688):

> "From the language of the agreement creating the joint venture it is clear that the partnership of Silberfeld & Co. and not the individual Samuel Silberfeld was the participant in the joint venture. The contract names 'Messrs. S. Silberfeld & Cie., Paris' as the party and throughout refers to acts to be performed by 'Messrs. S. Silberfeld & Cie.' and it is signed 'S. Silberfeld & Co.'"

In any event, we believe the District Court below erred in holding that the places of residence of the individual partners rather than the principal place of business of the partnership are controlling in laying venue under Section 1391(a) in a partnership suit, and that the District Court's error resulted from its refusal to follow the authorities hereinafter discussed.

(B) The District Court Erred in Refusing to Follow the Square Authority of *Darby* v. *Philadelphia Transportation Company*.

Square authority for the proposition that the principal place of business of a partnership rather than the places of residence of the individual partners should control the laying of venue in the federal court under Section 1391(a) in a partnership suit where the individual partners are named as parties is found in the case of *Darby* v. *Philadelphia Transportation Company*, 73 F. Supp. 522 (E. D. Pa. 1947, Ganey, *D. J.*). In the Darby case, the plaintiff, a citizen of South Carolina, brought suit in the District Court for the Eastern District of Pennsylvania to recover damages for personal injuries resulting from the alleged negligence of the defendants at the time of an accident which occurred in Philadelphia on August 1, 1946 when a trolley car, upon which the plaintiff was a passenger and which was owned by the Philadelphia Transportation Company, collided with a coal truck owned by the partnership of Ross & Wilson. The plaintiff named the following as defendants in her complaint: (1) PHILADELPHIA TRANSPORTATION COMPANY (a Pennsylvania corporation); (2) JAMES WILSON (a resident of Pennsylvania); (3) WILLIAM R. ROSS (a resident of Pennsylvania); (4) MARGARET KOCH (a resident of

Delaware); and (5) Ross & WILSON (a partnership having its principal place of business in Philadelphia). The defendants, Wilson, Ross and Koch, were sued "individually and trading as Ross & WILSON"; in other words, the partnership (Ross & Wilson), as well as the individual partnership members (Wilson, Ross and Koch), were sued and named as defendants in the action.*

A motion was made by the defendant partnership and by the individual members of the partnership as defendants to dismiss the complaint on the ground, among others, that venue had been improperly laid in the Eastern District of Pennsylvania since that district was not the residence of either the plaintiff or all the defendants as required by Section 51 of the Judicial Code, 28 U. S. C. A. § 112 (1940),** in a suit based upon diversity of citizenship. Judge Ganey denied the motion in a carefully reasoned opinion which, because of its precise application to the instant case, we set forth here in full, insofar as it deals with the defendants' claim of improper venue (73 F. Supp. 522, 523-525):

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*The caption of the complaint in the *Darby* case reads as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SANDY DARBY	:	CIVIL ACTION
v.	:	
PHILADELPHIA TRANSPORTATION CO., A Pennsylvania Corporation	:	
and	:	
JAMES WILSON, WILLIAM R. ROSS and MARGARET KOCH, Individually and trading as Ross & WILSON	:	No. 6624"

**Predecessor of Section 1391(a) of Title 28 of the United States Code.

"It is the contention of the defendant that a partnership has no citizenship independent of its members and that since one of the defendants, Margaret Koch, who is a citizen and resident of Delaware, invokes her privilege of venue, the complaint must be dismissed. Camp v. Gress, 250 U. S. 308, 39 S. Ct. 478, 63 L. Ed. 977. Further, it is contended jurisdiction here is determined by Sec. 51 of the Judicial Code, 28 U. S. C. A. §112(a), and in accordance therewith it is alleged that suit should be either maintained in the State of South Carolina, the residence of the plaintiff, or resort had to the state courts of the commonwealth.

In connection therewith Rule 17(b) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following section 723c, makes the capacity of a defendant to sue or be sued, determined by the law of the state wherein the federal court is located. Busby v. Electric Utilities Employees Union, 323 U. S. 72, 65 S. Ct. 142, 89 L. Ed. 78; Pullman Standard Car Mfg. Co. v. Local Union No. 2928, 7 Cir., 152 F. 2d 493. Accordingly, resort is then had to Rule 2128(a) of the Pennsylvania Rules of Civil Procedure, 12 P. S. Appendix, wherein the plaintiff has the option of naming any of the members of a partnership, or the partnership entity, as the defendant, or may join any combination of partners and the partnership entity as defendants, the partnership itself being recognized as an entity, separate and distinct from its members. In re Julian D. C. M. D. Pa., 22 F. Supp. 97. Therefore it is apparent that for the purpose of suit in a federal court a partnership has a jural entity.

Further Rule 4(d) (7) of the Federal Rules of Civil Procedure, 28 U. S. C. A. following Section 723c, provides, inter alia, that service of process upon a defendant partnership can be made 'in the